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Nos. 84-237, 84-238 and 84-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

YOLANDA AGUILAR, *et al.*, *Appellants*,

v.

BETTY-LOUISE FELTON, *et al.*, *Appellees*.

SECRETARY, UNITED STATES DEPARTMENT OF EDUCATION, *Appellant*,

v.

BETTY-LOUISE FELTON, *et al.*, *Appellees*.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, *Appellant*,

v.

BETTY-LOUISE FELTON, *et al.*, *Appellees*.

On Appeal From The United States Court Of Appeals For The Second Circuit

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE AND G. HUGH WAMBLE AS *AMICI CURIAE*

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INTEREST OF AMICI CURIAE

Americans United for Separation of Church and State is a nonprofit corporation formed to maintain and advance civil and religious liberties through the enforcement of the rights and privileges granted by the First and Fourteenth Amendments to the United States Constitution.

Americans United has a membership of some 50,000 members of various religious beliefs and some of no religious beliefs in all states of the United States, including the State of New York. Americans United is involved in extensive litigation of

First Amendment Free Exercise and Establishment issues throughout the United States.

Americans United is particularly interested in the issues raised in this case because the decision may directly affect two cases in which Americans United is currently participating. Those cases are *Wamble* v. *Bell*, United States District Court, Western District of Missouri, Western Division, Civil Action No. 77-0254-CV-W-8, which is presently awaiting a decision on the merits; and *Barnes* v. *Bell*, United States District Court for the Western District of Kentucky at Louisville, Civil Action No. C-80-0501-L(B). Both of these cases involve challenges under the Establishment Clause of the First Amendment to Title I of the Elementary and Secondary Education Act of 1965. In fact, in the brief of the Secretary of Education filed in the instant action, both the *Barnes* and *Wamble* cases are specifically referenced (see Brief for the Secretary of Education, p. 10). In addition, the brief of the government has referred to studies which specifically involve the Missouri Title I program (See Brief for the Secretary of Education, p. 10, n.7 and pp. 10 and 11, n.9).

Dr. G. Hugh Wamble is the plaintiff in *Wamble* v. *Bell*, *supra*. Note is made of the fact that the Question Presented is stated in broad terms—that being whether Title I of the Elementary and Secondary Education Act of 1965, which authorizes federal funding of remedial education for educationally deprived children (in public or private schools) in low income areas violates the Establishment Clause of the First Amendment insofar as it authorizes the funding of secular remedial classes taught by public school teachers under public school control on the premises of religious schools.

A decision in this action may well have a direct bearing on plaintiff Wamble's suit in Missouri. These amici will contend that the providing of teaching services on the premises of church-operated schools violates the Establishment Clause of the First Amendment to the United States Constitution.

INTRODUCTORY STATEMENT

Although the appeal in this case only directly involves New York City's Title I program, appellants have chosen to broadly state the question presented in order to obtain a response from this Court as to whether Title I violates the Establishment Clause of the First Amendment when public school teachers provide the services on the premises of religious schools. Although not revealed in any of the briefs of the appellants, almost all of the Title I services currently provided throughout the nation to nonpublic school students are administered on the premises of nonpublic schools. Thus, a decision in this case will have national impact.

Unfortunately, this case goes up on a paper record devoid of many of the facts which should be in the possession of the Court when deciding a constitutional question of this magnitude. Americans United for Separation of Church and State and G. Hugh Wamble respectfully submit that a fuller record would be more desirable.[1]

This case does not simply present the Court with the responsibility of resolving disputes among private parties—rather, it involves the determination of issues impacting one way or another on a large segment of our population and perhaps establishing or affecting principles of law of great importance to church-state contacts.

This suit does not merely seek to clarify the meaning of the law remitting the parties to private ordering of their affairs,

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[1] Unlike the instant case, in *Wamble* v. *Bell* the court devoted 21 days to trial and on March 30, 1983, provided a full day for oral argument. During the course of the trial 23 live witnesses testified, and the court received additional testimony in the form of depositions from 35 witnesses. In addition, approximately 800 documents were offered and received into evidence. One of the issues directly presented to the court involved the action taken by the Commissioner of the United States Department of Education as a result of the report furnished to the Commissioner which is referred to in the Brief for Secretary of Education at pp. 10 and 11, n.9.

but itself establishes a regime ordering the future interaction of the parties and of absentees as well.

It is respectfully submitted that this case requires the Court to take judicial notice of matters not formally of record in the pending litigation. See *Wilson* v. *Sigler*, 285 F.2d 372, 383 (8th Cir. 1961), and *United States* v. *Verlinsky*, 459 F.2d 1085, 1089 (5th Cir. 1972).

It is further suggested that this is an appropriate circumstance for the Court to take judicial notice of proceedings in other courts within the federal judicial system, particularly since reference has been liberally made concerning studies in Missouri which directly impact on the case of *Wamble* v. *Bell*, *supra*. See *St. Louis Baptist Temple, Inc.* v. *Federal Deposit Insurance Corp.*, 605 F.2d 1169, 1172 (10th Cir. 1979).[2]

SUMMARY OF ARGUMENT

The Court of Appeals has faithfully followed the prior decisions of this Court in reaching its opinion that the New York Title I program providing remedial education at taxpayers'

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[2] Judicial notice may even be taken of briefs filed in other courts, *United States* v. *Walters*, 510 F.2d 887, 890, n.4 (3d Cir. 1975), including amici briefs since they are matters of public record, and their contents are subject to scrutiny and analysis by the Court. *Happy Investment Group* v. *Lakewood Properties, Inc.*, 396 F.Supp. 175, 183, n.6 (N.D. Cal. 1975). In fact, notice may be taken by the Court of public records lodged with governmental agencies, *White* v. *Califano*, 437 F.Supp. 543 (D. S.D. 1977). Amici will, in this brief, from time-to-time, refer to the record in the United States District Court for the Western District of Missouri in *Wamble* v. *Bell*. In this regard, it should be noted that the evidence referred to will relate to testimony by officials of the United States Department of Education and of documents authored or received by them. The purpose of these references is not to prove or disprove the claim of the plaintiff in *Wamble* v. *Bell* but to bring to bear on the broad issue presented to the Court factual information necessary for a constitutional determination. *Weaver* v. *Palmer Brothers Co.*, 270 U.S. 402, 410 (1925). Citations to "___ testimony, ___ Tr ___" are to the transcript of the trial of *Wamble* v. *Bell*, *supra*. Relevant pages from the transcripts or exhibits referred to are annexed hereto as an Appendix to this Brief and referred to as "___a."

expense on the premises of church schools violates the Establishment Clause of the First Amendment.

Not only was the Second Circuit correct in its application of the prior decisional law, but any other conclusion would ignore reality and defy logic. An analysis of the result of validating this type of a program clearly reveals that the providing of instruction in sectarian schools would create a continuing danger of future undetected advancement of religion at taxpayers' expense. In addition, this program fusing secular education at taxpayers' expense with religious education would directly advance the educational ministry of the sponsoring church, thus resulting in an application of public funds in a manner having the primary effect of advancing religion.

The on-premises Title I program also creates numerous entanglement problems which result from the shared use of the same church-school facilities and the overlapping jurisdiction over the same students during the school day. This arrangement is pregnant with dangers of government intrusion into the institutional affairs of religious institutions without any effective means of monitoring against constitutional abuse.

The prior holdings of this Court suggest that where there are various alternatives available in the providing of federally-supported services, and there is a potential for church-state entanglement, the least entangling alternative should be sought in administering such a program. For this reason, Title I services made available to students attending nonpublic schools should be provided at religiously-neutral sites. Such an arrangement will not only reduce the possibility of the program advancing religion and creating excessive entanglement, but will also maximize the benefit of the services to nonpublic school students who would otherwise be denied the entitlement because they are not enrolled in a religious school where the church and state have entered into a partnership.

Although appellants claim that the prior holdings of this Court concerning aid to pervasive sectarian schools are not applicable to the religious schools in New York where Title I services are provided because of a claimed variation from the

Meek profile, such defense must fail. This Court has repeatedly indicated that it will not be wedded to a formal list of criteria for determining whether a church-operated elementary or secondary school is pervasively sectarian.

The fusion of government-sponsored education with the religious educational ministry provided on the premises of church schools with the ever-present religious atmosphere violates the Establishment Clause of the First Amendment and must be struck down. Title I services should be provided both to public and nonpublic school students, but not in violation of First Amendment rights.

ARGUMENT

I. THE OPINION OF THE COURT OF APPEALS IS FULLY SUPPORTED BY THE PRIOR DECISIONS OF THIS COURT.

When reduced to the simplest terms, the core issue in this case is whether a federal program utilizing public school teachers to provide educational services within church-operated schools is a violation of the Establishment Clause of the First Amendment to the United States Constitution.

Every analysis in this area of constitutional inquiry must start with a consideration of the cumulative criteria developed by this Court over many years. In its consideration of cases implicating the Establishment Clause over the past two decades, this Court has developed three criteria by which to measure the constitutionality of a government act or action:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the statute must not foster "an excessive government entanglement with religion."

Lemon v. *Kurtzman*, 403 U.S. 602, 612-613 (1971).

Later, in *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 783-785, n.39 (1973), this Court amplified the meaning of the "primary effect" standard:

> Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. . . . Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the plurality found that the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might, "*in part* have the effect of advancing religion." 403 U.S., at 638 (emphasis supplied). . . .
>
> [S]ecular objectives, no matter how desirable and irrespective of whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify . . . a direct and substantial advancement of religion.

In *Lemon* v. *Kurtzman*, *supra* at 602, the Court delineated the meaning of excessive entanglement. It ruled that Rhode Island's Salary Supplement Act, which authorized salary supplements for non-public school teachers who taught only those courses offered in the public schools, violated the First Amendment. This Court noted in *Lemon*, *id.*, at 618:

> Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid.

This Court in *Lemon* added that the Court need not assume that parochial school teachers will be guilty of bad faith or have any conscious design to evade First Amendment limitations and said:

> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to

> make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion.

Id. at 618-619.

It makes no constitutional difference that the teachers are not employed by a religious organization or directly subject to the direction and discipline of religious authorities. These facts were found to be irrelevant in *Meek* v. *Pittenger*, 421 U.S. 349, 370-371 (1975). In *Meek*, the remedial reading teachers were not employed by a religious organization or subject to direct religious authority. Like the instant case, the teachers in *Meek* were public school employees providing remedial reading services on the premises of church schools. Nevertheless, this Court said that this:

> . . . does not substantially eliminate the need for continuing surveillance. To be sure, auxiliary-services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. . . . [citation omitted] But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. . . . [citation omitted] The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to insure that those restrictions were being followed.

Id. at 371-372.

Later this Court in *Wolman* v. *Walter*, 433 U.S. 229, 247 (1977), which also involved public school employees, stated that the constitutional danger arose because the services performed by the publicly employed personnel were rendered in the pervasively sectarian atmosphere of the church-related school. The *Wolman* Court observed that "[t]he danger existed there, not because the public employee was likely

deliberately to subvert his task to the service of religion, but rather because the pressures of the environment [not of the parochial school principal] might alter his behavior from its normal course." *Ibid.* See also *Public Funds for Public Schools* v. *Marburger*, 358 F.Supp. 29, 40 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974)

The most recent decision of this Court involving the Establishment Clause, *Lynch* v. *Donnelly*, 104 S.Ct. 1355 (March 5, 1984), has neither cast aside the three-part *Lemon* test nor repudiated *Meek* or *Wolman*. In fact, this Court in *Lynch*, reaffirmed many of its prior decisions, including *Lemon*, *Nyquist*, and *Meek*.

In *Lynch*, this Court discussed the Court's previous differentiation between an on-premises shared-time program found unconstitutional in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), and an off-premises released-time program determined constitutional in *Zorach* v. *Clauson*, 343 U.S. 306 (1952). *Id.* at 1363-1364.

II. LOGIC CONFIRMS THE PRIOR HOLDINGS OF *MEEK* AND *WOLMAN*.

The Second Circuit Court of Appeals viewed the sparse summary judgment record and correctly observed that the ever-present potential for advancing religion was present in this case. The Court of Appeals noted that children in 51 of the 231 nonpublic schools received remedial instruction from public school teachers who regularly taught in such schools. The Court also noted that many of the Title I teachers taught in schools which shared their own religious affiliation.

This Court in *Meek* was concerned that "the pressures of the environment might alter . . . [the teachers'] behavior from its normal course." 433 U.S. at 247. The remarkable perception of this Court in *Meek* seems to be supported by Monsignor John J. Leibrecht who writes:

> Frequently enough when one speaks about distinctive qualities of the Catholic school, the word "atmosphere" comes up. The school has some sort of intangible thing

> called atmosphere. It comes not from the physical facilities, or the religious classes, or the students—at least not chiefly. The most distinctive and valuable thing the Catholic school can offer to parents is its faculty—even more important than the religion classes themselves to the totality of curriculum.
>
> * * *
>
> When the student comes into the Catholic school, he somehow becomes involved in the faculty's own Christian community life. Just as a child, for good or for bad, gets caught up in the life of the family to which he pays an extended visit, so the student is influenced by the faculty's Christian community life. The atmosphere of the Catholic school, no less real because it is intangible is the spirit created by the common Christian life conscienciously lived by the faculty and participated in by the students.

Leibrecht, "Thoughts on the Catholic School," *The Catholic Educator*, 27 at 28, 33 (May, 1966).

If a student can become subsumed in the atmosphere of the church school, the Court is rightly concerned with the potential for subtle pressures being exerted upon teachers of common religious faith by the sponsoring church.

Professor Donald A. Giannella described a similar concern embraced in the Court's decision in *Meek* v. *Pittenger*, *supra:*

> . . . as a recent study of Catholic parochial education points out [Notre Dame Report, Catholic Schools in Action, 17 (R. Neuwien ed. 1966): "the very presence of the religious [teachers and administrators] is in itself a dominant, unforgettable symbol." This pervasive atmosphere makes on the young student's mind a lasting imprint that the holy and transcendental should be central to all facets of life. It increases respect for the church as an institution to guide one's total life adjustments and undoubtedly helps stimulate interest in religious vocations.
>
> In short, the parochial school's total operation serves to fulfill both secular and religious functions concurrently, and the two cannot be completely separated. Support of any part of its activity entails some support of the dis-

> qualifying religious function of molding the religious personality of the young student.

Giannella, "Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle," 81 Harv. L. Rev. 513, 574 (1968).

We believe that the decision in *Meek* prohibiting public school teachers from conducting classes within the church schools is not only logical but necessary if the Establishment Clause is to be effective. Parochial schools are not open to as much public scrutiny as public schools. Public schools include teachers and students of varying religious persuasions as well as those who may be strongly opposed to any form of religion. The public school's business is, in fact, public, and its governing boards are answerable to the voters. There is a diversity of religious and philosophical views represented on the boards and in the administration of the public schools not found in church schools. There is thus a built-in surveillance system which is usually present at the public school.

Conversely, in the church-operated school, the regular classroom teacher, the student or parent would not be so apt to blow the whistle on violations which may occur in the Title I room since sectarian teaching and activity are expected and accepted parts of the remainder of the school program.

Because of this readily apparent distinction between public and parochial schools, there is a greater likelihood that future violations would be more easily left undetected in the church school where those in attendance or control may not be at all sensitive to the concept of religious neutrality. This, in part, justifies decisions of this Court which reject aid programs on the basis of the "potential" or "danger" of violations rather than awaiting later exposures of unconstitutional application where funds have already been disbursed and the wrong has already been done.

Meek teaches that in sectarian schools where there is no internal built-in mechanism for surveillance[3] such as exists in public schools, there can be only one way of insuring the religious neutrality of a governmentally-financed program: an all pervasive and ever watchful governmental monitoring program which raises separate constitutional concerns as to excessive entanglement.

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[3] There is no statutory restriction whatever on the activities of Title I personnel teaching on church school premises. Federal Title I regulations are also devoid of any limitation or restrictions on the activities of Title I teaching personnel. Even if there were legislative or regulatory restrictions, there has not been any monitoring program set up to ferret out violations of the Establishment Clause. One of the counsel for the intervenor-defendants in the instant action, in commenting on this and other Title I cases, observed:

> That there are problems of a constitutional dimension in some of the pending Title I cases is significant for two reasons. First, we had assumed, somewhat naively, that the Title I program we defended in New York was a model of Title I instruction around the country. What we have discovered is that there are great deviations from the PEARL model, and in my view, the greater the deviation, the greater the risk the program will fail.
>
> * * *
>
> The second problem that has been disclosed by these deviations is that the policing of Title I is really very loose. There is virtually no monitoring at the federal level. At the state level, so few resources are allocated for Title I administration that each local school district is substantially free to do as it wishes. A consequence of this is the greater burden it places on diocesan and archdiocesan school officers to scrutinize the way Title I is being implemented within their particular jurisdiction and to discover incipient problems that could be intercepted before a lawsuit is filed.

Wilson, "ESEA Title I Litigation—A National View," *The Catholic Lawyer*, Sept. 1982, 231 at 235.

Mr. Wilbert A. Cheatham, Director of Compensatory Education for the United States Department of Education, and the person who had general administrative responsibility for Title I throughout the nation, was called by the government to testify in *Wamble* v. *Bell*, *supra*. Mr. Cheatham testified that in the United States, as a whole, federal personnel visit and monitor less than 1% of the 14,000 local educational agencies each year (Cheatham testimony, 11 Tr 149) (13a) due to the availability of only 70 to 125 persons to do the monitoring throughout the country (Cheatham testimony, 12 Tr 46) (19a).

Under general provisions applicable to Title I, there is a statutory requirement that nothing in Title I "shall be construed to authorize the making of any payment . . . for religious worship or instruction." 20 U.S.C. § 3384. This, however, leaves the Title I teacher whose "professionalism" is the remaining protection against church-state violations, pretty much at sea.[4] More precision is required to prevent the otherwise inevitable disagreement as to when a teacher has crossed the constitutional barrier.

The appellants have attempted to distinguish this case from *Meek* on the basis that the services are provided in a religiously neutral classroom[5] set apart from the rest of the church school—a religiously neutral oasis where religious objects have been removed.

It is difficult to discern why a "desanctified" room within a church school which itself maintains instructive religious objects, curriculum, programs, and characteristics should provide less opportunity for the fostering of religion.

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[4] Federal auditors who testified in *Wamble* v. *Bell* found nothing in the federal regulations about what religious neutrality means (Livingston testimony, 14 Tr 65) (36a-37a). They came to the consensus view that Title I instructors should not provide "the class with various religious articles," not say "mass in the same room they are giving Title I," and that there should be no altars (Livingston testimony, 14 Tr 66) (37a). Although the program had been in operation for a number of years, out of nine schools investigated, the federal auditors found crucifixes on the Title I room walls of two schools in St. Louis, a religious picture on the wall of another room used for Title I, and a covered altar in a Title I classroom in Jefferson City (Livingston testimony, 14 Tr 66) (37a).

The auditor, however, failed to include these violations as a part of his report because after speaking with his Regional Inspector General he "felt that it to be not significant" (Livingston testimony, 14 Tr 66-67) (37a-38a).

[5] According to Wilbert A. Cheatham, there is no federal definition of "religiously-neutral" setting (Cheatham testimony, 11 Tr 150) (13a-14a). He further testified in *Wamble* v. *Bell*, *supra* that he would not know what to look for, and on-site Title I personnel would have to make the judgment about such a setting. (*Id.* at 150-151) (13a-15a).

III. A TITLE I PROGRAM CONDUCTED ON CHURCH SCHOOL PREMISES HAS THE EFFECT OF AIDING RELIGION.

To be sure, this aid program was designed to assist students, but so has every other aid program which has been struck down by this Court. If the program is a public benefit, no child should be excluded because of his or her parents' religious beliefs and practices. The Title I program is often defended against Establishment Clause attack on the basis that it is provided to the student and not the church school. However, unlike the bus transportation benefit validated in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the decision for the student to receive benefits is initially made by the school rather than the parent, and it is this arbitrary decision which determines if a nonpublic school student will be able to participate in the Title I program.[6]

When Title I services are provided only to students enrolled in a church school, and in a room which is physically an integral part of that school, another evil arises. As Professor Laurence Tribe argued:

> Apart from the significance of symbols in establishing precedents for more dangerous incursion, the fact of symbolic governmental identification with a religious activity must be understood to constitute a separate evil in a system that regards matters of religious concern as ultimately delegated to individual and community conscience.

Tribe, *American Constitutional Law*, § 14-12 at 868 (1978).

To an impressionable student, even the appearance of secular involvement in religious activities may be a symbolic influence too dangerous to permit. *Brandon* v. *Board of Educa-*

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[6] Wilbert A. Cheatham testified in *Wamble* v. *Bell*, *supra*, that if a nonpublic school does not elect to participate in the Title I program, perhaps because of its beliefs against receiving government aid, a child otherwise eligible for Title I benefits, but attending such a nonpublic school, would not be served by Title I. In fact, according to Cheatham, most Seventh-day Adventist schools elect not to participate (Cheatham, testimony, 12 Tr 114-122) (24a-31a). See *infra* p. 18 for entanglement implications.

tion, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 454 U.S. 1154, (1981). See also *Widmar* v. *Vincent*, 454 U.S. 263, 273, n. 13 (1981).

Title I programs conducted within church schools inevitably tend to merge into the overall religious educational programs of the schools in which they operate. Parents and the community perceive the Title I program as part of the school curriculum.

The fusion of governmental and sectarian activity within the bosom of the church school itself carries with it the high risk that the program will be perceived as an endorsement of religion. See *Lynch* v. *Donnelly*, 104 S.Ct. 1355, 1368 (March 5, 1984) (O'Connor, J., concurring).

Appellants have attempted to justify the Title I program on the basis of the "child benefit" theory. In *Committee for Public Education* v. *Nyquist*, *supra*, this Court struck down a program that was a "hybrid" between a tax credit and a tax deduction. The Court in *Nyquist* rejected the "child benefit" theory offered in justification for the program and held that the tax benefit had "the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794. This Court in *Nyquist* stated:

> The controlling question here, then, is whether the fact that the grants are delivered to parents rather than to schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: as noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools and in *Allen* textbooks were loaned directly to the children. *But those decisions make clear that, far from providing a per se immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.*

Id. at 781. (Emphasis supplied).

To permit the child benefit theory to be extended in such a way as to permit public funds to be used for the providing for teaching staff on the premises of parochial schools would place form over substance. In fact, there would be no logical stopping point. What is the constitutional distinction between sending a teacher to a prochial school to provide remedial reading services and sending a teacher to a parochial school to teach reading itself? In both instances, services are directly related to the advancement of the religious missions of the schools whose pupils' learning abilities such services are designed to assist.

In *Wolman* v. *Walter*, *supra*, this Court faced an attempt by the State to use the child benefit theory to furnish instructional materials to nonpublic schools by claiming that the instructional materials were actually being furnished to the children and not to the schools. This Court, however, struck down this law stating that "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id.* at 250.

The constitutional violation in this case is even clearer than in *Wolman*. In that case the Court was concerned merely with neutral and secular educational material and equipment. In this case we are concerned with teachers, a substantial portion of whom are of the same religious faith as the church which operates the schools in which they teach. Here we are dealing with teachers acting on an individualized basis with small groups of children. It is submitted that the decisions in *Meek* and *Wolman* stand for the proposition that the "child benefit" theory will not be permitted to validate a program whereby public school instructors teach within the four walls of a parochial school. In fact, in *Everson*, although the Court there upheld public payment of bus transportation on the grounds that the children were merely "receiving the benefits of public welfare legislation," it nevertheless stated in strongest dictum that this was as far as the Establishment Clause would extend. This Court in *Lemon*, *supra*, at 624 correctly observed that in

constitutional adjudication some steps which, when taken, were thought to approach "the verge" have become the platform for yet further steps. This Court should not permit such further erosion. "[C]ourts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded." *Lynch* v. *Donnelly*, *supra* at 1370 (O'Connor, J., concurring).

In *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), this Court reviewed a case that arose in Missouri relating to Title I. In *Wheeler* the Court considered two issues—one, whether Title I required the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students; and two, whether the requirement, if it exists, contravenes the First Amendment. The Court, however, concluded that it could not reach a decision on either issue on the record before it. Nevertheless, Justice Douglas, in a dissenting opinion, noted:

> Federal financing of an apparently nonsectarian aspect of parochial schools' activities, if allowed, is not even a subtle invasion of First Amendment prohibitions. . . . Allowing the State to finance the secular part of a sectarian school's program "makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries."

Id. at 431. (Douglas, J., dissenting).

Justice Powell, in a concurring opinion in *Wheeler*, agreed with the majority that in the posture that the case was then before the Court, it was "unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment." However, he added, "I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools," citing *Committee for Public Education* v. *Nyquist*, *supra*. *Id.* at 428. (Powell, J., concurring).

IV. THE PROVIDING OF TEACHING SERVICES BY PUBLIC SCHOOL TEACHERS WITHIN CHURCH SCHOOLS CREATES THE POTENTIAL FOR EXCESSIVE GOVERNMENTAL ENTANGLEMENT AND IS THUS UNCONSTITUTIONAL.

In their brief, the government rejects the contention that the Title I program creates excessive entanglement between church and state. However, the government seems to primarily deal with entanglement in the context of government surveillance claiming that "the surveillance at issue here involves only *public school* teachers and *public school* authorities." (Brief for the Secretary of Education, p. 37). The government's brief then notes "[s]uch surveillance obviously entails no relationship between the government and religious authorities." *Ibid.*

The government ignores the practicalities resulting from the Title I program being conducted on the premises of parochial schools. Unfortunately, here we are not dealing merely with surveillance of public school teachers by public school authorities. The Federal Government requires that a parochial school in which a Title I program is located provide facilities which are religiously neutral. To be religiously neutral the Title I program must be free from all religious objects, including religious symbols (see Brief for the Secretary of Education, p. 12). Therefore, it is not surprising that from time-to-time administrators of church schools may not kindly accept the regulatory demands that they strip any portion of their facility of religious symbols.[7] Government can run afoul of the Establishment

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[7] Mr. John Schmiedeler, Superintendent of Schools for the Diocese of Kansas City-St. Joseph, testified in *Wamble* v. *Bell*, *supra*, concerning an incident following an inspection of Our Lady of Americas School in connection with the Title I litigation. Following the inspection, the principal of the school was told that she should take the crucifix down from the Title I room. The principal thereupon took the matter to the parochial school board creating sufficient controversy to require the diocesan superintendent of schools to discuss the matter with the bishop. The bishop ultimately ordered the removal of the crucifix. Mr. Schmiedeler, at the *Wamble* trial, testified that "the principal indicated that the pastor and their local school board, which

Clause by "excessive entanglement with religious institutions, which may interfere with the independence of the institutions. . . ." *Lynch* v. *Donnelly*, *supra* at 1366 (O'Connor, J., concurring).

The parochial school student is under the control and supervision and subject to the discipline of the church school during the full time that the student is at the parochial school whether the student is receiving instruction from the church-school teacher or a Title I public employee.[8]

Serious questions may well arise as to who has the authority for the disciplining of students while in the Title I room, whether the rules and regulations apply during the time that a parochial school student is attending classes in a Title I room, whether the Title I teacher may use the principal to discipline a child for transgressions which have occurred during the time the child has been in the Title I room, and whether the Title I teacher should enforce the disciplinary rules of the school. Other examples of possible conflict between the church-school authorities and the Title I public school employees include the potential for scheduling disputes and even the question as to whether a private school student, not attending a parochial school where a Title I program is provided, can be admitted onto the facilities and into the program without enrollment in

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represented the parents, were somewhat aghast at the thought of taking the crucifix down in one of their classrooms." (Schmiedeler testimony, 19 Tr 197-198 (38a-39a), 201 (40a); see also Hagan testimony indicating that the removal of the crucifix was a big decision because it was an object of reverence, 7 Tr 24, 25-26) (10a-13a).

[8] According to the current Federal Project Officer for the United States Department of Education, a principal of a particular school is ultimately responsible for any child enrolled in a private school. However, during the time a child is in a Title I classroom, the child is also subject to the Title I teacher's supervision and control (Williams-Madison testimony, 13 Tr 111) (34a). According to the Federal Project Officer, although the principal may have control over the person of the student when the student is in the Title I room, the parent, by agreeing, to let the child receive Title I instruction, relinquishes, to some degree, some responsibility to the Title I teacher (William-Madison testimony, 13 Tr 117-118) (34a-36a).

the parochial school itself. Excessive entanglement may also occur when a religious institution is granted "access to government . . . not fully shared by nonadherents of the religion." *Ibid.* See *supra*, n.6.

It is evident that State interference with the autonomy of the church, since it controls the site and the providing of remedial services on the premises, is always a matter of concern between a church and the public school authorities. In fact, some churches operating church-schools have refused Title I services simply because they do not want such government intrusion.[9]

In *Lynch* v. *Donnelly*, *supra*, at 1364, this Court referred to *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982), where an important governmental power—a licensing veto authority—had been vested in churches. This Court held that giving such authority to a church was unconstitutional. The Title I program, in essence, grants to churches operating parochial schools veto power over a child's receipt of benefits under Title I. If a parochial school decides that it will not agree to a Title I program on its premises or refuses to remove its religious symbols or otherwise relinquishes a part of its autonomous control over its facilities and its students, it is the needy student who is excluded. A program providing for remedial education to students predicated upon agreement between church and state, therefore permits the student's entitlement to Title I services to be subject to a veto by a church institution.

The majority of this Court in *Lynch* v. *Donnelly*, *supra*, at 1358, noted that "the purpose of the Establishment and Free Exercise Clauses of the First Amendment is 'to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.' *Lemon* v. *Kurtzman*, 403 U.S. 602, 614. . . ." Although the Court in *Lemon* also acknowledged that total separation is not possible in an absolute sense this Court has never abandoned its concern, as expressed by Justice O'Connor, that institutional entanglement is an evil with

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[9] Cheatham testimony, 12 Tr 114-122 (24a-31a).

which the Establishment Clause of the First Amendment is concerned. *Id.* at 1366 (O'Connor, J., concurring). Title I programs existent in the various states of the Union daily present the imminent potential of institutional entanglement.

The majority in *Lynch* found no entanglement with reference to the display of the creche noting that in that situation "[t]here is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the creche." *Id.* at 1364. Unlike the situation existing in *Lynch* v. *Donnelly*, however, there is not only initial contact with church authorities concerning the content or design of the Title I program on the premises but there is daily contact regarding sensitive questions.

V. APPELLANTS' CONTENTION THAT THE CHURCH SCHOOLS IN WHICH TITLE I SERVICES ARE PROVIDED DO NOT DUPLICATE THE "PROFILE" OF *MEEK* v. *PITTENGER* DOES NOT SAVE THE TITLE I PROGRAM FROM ESTABLISHMENT CLAUSE CHALLENGE.

In *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), this Court held that church-affiliated elementary and secondary schools are pervasively religious or sectarian, thus preventing government grants to partially finance teachers of non-religious or secular subjects in such schools because of the entangling surveillance that would be required. Subsequent to *Lemon*, a three-judge court in *Public Funds for Public Schools of New Jersey* v. *Marburger*, 358 F.Supp. 2933-34 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1973), stated:

> While in some instances it may be that religious values do not affect the content of the secular education provided by these institutions, it is clear that the purpose of such religious-affiliated schools is, in substantial part, to teach and thus advance a given religious faith. The Supreme Court has "long recognized that religious schools pursue two goals, religious instruction and secular education," *Board of Education* v. *Allen, supra*, 392 U.S. at 245, 88 S.Ct. at 1927; that, further, "the raison d'etre of parochial schools is the propagation of a religious faith." *Lemon* v.

> *Kurtzman, supra*, concurring opinion of Justice Douglas, 403 U.S. at p. 628, 91 S.Ct. at p. 2118. Accordingly, we are satisfied that the nonpublic schools which have participated in the New Jersey Aid to Nonpublic Schools Act are, and will be, for the most part, church-related or religious-affiliated educational institutions.

In *Meek* v. *Pittenger*, *supra*, at 366, this Court cited and took judicial notice of the characteristics of church-affiliated schools, as discussed in Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1680, 1688-1689 (1969), in invalidating the use of public funds for church-affiliated schools.

Nowhere has this Court stated that the answer to ten questions about the nature of an institution determines whether it is pervasively sectarian. It is true that in *Meek*, the Supreme Court referred to the complaint in that action which alleged that the statutory provision under attack was a law respecting the establishment of religion in violation of the First Amendment because it authorized and directed payments to or use of books, materials, and equipment in schools which allegedly had ten specified characteristics. *Id.* at 355-356. One looks in vain in the *Meek* decision or any other decision of this Court for a suggestion that ten characteristics, which the counsel in *Meek* suggested were a profile representation of the schools therein, are the beginning and end of all inquiry on the subject of what is a pervasively sectarian institution.

In *Wolman* v. *Walter*, *supra* at 235-236, this Court made reference to the three-judge lower court decision. Of significance is the district court's decision, 417 F.Supp. 1116, 1117 (S.D. Ohio 1976), wherein the court noted many aspects of the so-called *Meek* profile characteristics were missing. The Court, however, found no difficulty in holding to the *Lemon* finding that church-affiliated elementary and secondary schools are sufficiently religious to invalidate public aid to them in spite of the points of distinction which the district court's opinion in *Wolman* noted.

Clearly, this Court in deciding these sensitive constitutional questions has never felt that it was wedded to a legalistic definition of what is and what is not sectarian. In *Committee*

for Public Education and Religious Liberty v. *Nyquist*, *supra*, at 767-768, this Court stated that the schools "may vary widely from the supposed profile."

It is submitted that there is no logic in the argument that unless a church forces a student to become a member of its faith, it is somehow less sectarian than those institutions which seek to influence religious thought by more subtle and sophisticated means.

In *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), this Court indicated its concern for the potential of government entanglement in church institutional affairs.[10] If it

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[10] This Court may take judicial notice of the amicus brief filed by the U.S. Catholic Conference in *NLRB* v. *Catholic Bishop of Chicago*, No. 77-752. On p. 1 of their Brief, the United States Catholic Conference states that it is the agency of the Catholic bishops of the United States. On page 2 of their Brief they further stated:

> It is the concern of the USCC that the fulfillment of the mission of the Roman Catholic parochial school system not be interfered with by the jurisdiction of a Federal agency concerned with labor relations over the schools' teachers.
>
> In 1978, 9,202 Catholic elementary and secondary schools served the educational needs of almost three and one-half million students. The Bishops of the United States and the USCC are committed to the belief that Catholic schools fulfill a crucial mission; that is, of providing an educational environment in which children and young people can "experience learning and living fully integrated in the light of faith. . . . Students are instructed in human knowledge and skills, valued in deed for their own worth but seen simultaneously as deriving their most profound significance from God's plan for His Creation."

The quoted portion of the preceding paragraph is from the National Conference of Catholic Bishop's pastoral letter of November, 1972, entitled "To Teach as Jesus Did."

On page 11 of its Brief, the Catholic Bishop acknowledged that the Roman Catholic school system in this country is a component of the Roman Catholic Church, stating:

> In the instant situation, the National Labor Relations Board (NLRB) has, *sua sponte* taken upon itself jurisdiction to regulate an activity of a component of the Roman Catholic Church. By virtue of its decision to so extend its jurisdiction, the NLRB has sought to establish a more or less permanent institutional attachment to the sectarian institutions at issue here. The question which such a presence poses is whether or not the institutional integrity of the sectarian institution has been compromised. If it has, then we submit that the government has violated

is constitutionally improper for the government to delve into the religiousness of a school to determine whether the National Labor Relations Board has jurisdiction over the Catholic lay teachers employed by the Roman Catholic elementary and secondary school system, it would seem equally violative for the court to become involved with dissecting the religiousness of elementary and secondary schools to determine entitlement to taxpayer's support.

There is no statutory limitation in Title I nor any regulatory provision limiting the services provided on-premises to students attending church schools to those schools that are not "pervasively sectarian."[11]

It is respectfully submitted that courts are prohibited by the proscription of the First and Fifth Amendments from dividing church-affiliated elementary and secondary schools into two classes, those that are "too" religious or sectarian, and those

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the First Amendment guarantees of the Free Exercise Clause of the United States Constitution.

And finally, at page 14 of its Brief, the Bishop on behalf of the Roman Catholic Church's parochial school system, states:

> Rather, we are speaking of the vital institutional qualities which go to the very root of the institution, *qua* institution, and mingle inextricably with matters of belief and spiritual orientation. In the instant case, the dispute involves the relationship which is to exist between teacher and employer in a school, a relationship which this Court has repeatedly held to be of signal import to the institutional character of the school. *Meek* v. *Pittmyer [sic]*, 421 U.S. 349 (1925) [sic]. Inevitably, the dispute touches upon the manner of resolving—in the *locus* of authority for resolving—such questions as *who* shall teach in a school and *under what conditions*. But, given the nature, mission, and sponsorship of the schools involved, these are not questions to be resolved by government. For it to presume and act otherwise is a violation of the Free Exercise Clause. The government, through the NLRB, has asserted that it has a determinative role to play in the definition of this relationship. In our view, because the matter involves the integrity of the institution, government does not have such a role, and, equally to the point, the right to say yea or nay with respect to a proposed government intervention of this nature must, under the First Amendment, reside with ecclesiastical authorities.

[11] As far as the United States Department of Education is concerned, Title I services are provided to students attending church schools regardless of the degree of religiousness of those schools (Cheatham testimony, 12 Tr 41-45) (15a-19a).

that are less religious in determining whether public funds or benefits may be provided to church schools under a general federal education aid program.[12]

VI. THE NEW YORK ON-PREMISES PROGRAM IS NOT THE LEAST ENTANGLING ALTERNATIVE AVAILABLE.

The government has attempted to prove the necessity for a on-premises program by reference to a claimed "full investigation" by the Department of Education involving a study in Missouri (Brief for Secretary of Education, p. 10 and n. 9).[13]

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[12] Professor Donald Giannella has observed that a determination of the degree of religiosity would involve the judiciary in the kind of entanglement which the Court has been trying to avoid in First Amendment cases. Professor Giannella also stated that if a highly refined and particularistic test were adopted by the court with reference to the religiosity of the schools some schools and religions would inevitably register plausible complaints of invidious discrimination or lack of equal treatment as the dividing line was etched out case-by-case. Professor Giannella suggested that when judicial decisions turn on such "elusive" and "ephemeral" matters concerning religion, entanglement seems excessive, and equal treatment of religion in schools is seriously endangered. Giannella, "Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement," 1971 The Supreme Court Review 147 at 181.

[13] The validity of this study has been directly attacked in the case of *Wamble* v. *Bell*, *supra*. No decision has yet been rendered in that case, however, one of the issues raised in that case is whether in fact the Commissioner's decisions to invoke the by-pass provisions of 20 U.S.C. § 2740(b) in Missouri were supported by substantial evidence.

On January 22, 1976, after the Missouri study was completed by the United States Department of Education, Arthur L. Mallory, Commissioner of the Department of Elementary and Secondary Education of the State of Missouri, directed a letter to the Honorable T. H. Bell, U.S. Commissioner of Education, in response to the findings of Dr. Bell which were generated by the Missouri report. (See letter from Arthur L. Mallory to T. H. Bell dated January 22, 1976 (1a-9a).

Perhaps more significant was a June 24, 1976, memorandum from Assistant Commissioner John Rodriguez of the United States Office of Education which was directed to Deputy Commissioner Robert Wheeler of the United States Office of Education. In that memorandum Mr. Rodriguez opined that: "the non-public school officials who complained about Title I services in Missouri seemed to base their complaint in part on the assumption that

In *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), this Court seemed to opt for approving the least entangling alternative available when there was a potential for excessive entanglement. In *Walz*, the Court recognized that failing to give tax exemptions could create more entanglement problems than granting an exemption. The Court specifically noted that exemptions restrict the relationship between church and state and tend to complement and reinforce the desired separation insulating each from the other. *Id.* at 676. Here, the least entangling alternative would be a program operated on a completely religiously-neutral site.

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before or after school services are 'inherently' not equitable if public school students receive such services during the school day." Mr. Rodriguez then stated "there is no empirical evidence to substantiate or support this assumption. It is attitudinally derived."

The memorandum from Associate Commissioner Rodriguez further stated:

> There is, however, substantial evidence that a positive correlation exists between the quantity of education and school achievement. From this evidence we can deduce with reasonable justification that before or after school, school services increases the quantity of a student's education and therefore benefits him in excess of what he would receive if services were provided during the school day. It is assumed in this deduction that quality education is being provided. Serious attention should be given this argument. I am willing for the sake of argument in our session on the by-pass report with the Commissioner to take such a position.

(See memorandum dated June 24, 1976, from the desk of the Associate Commissioner reproduced in full and attached at 9a-10a).

The Director of Compensatory Education Wilbert A. Cheatham, the federal official who at the time of trial in *Wamble* v. *Bell* was responsible for Title I nationwide, agreed that there was no empirical evidence to refute Rodriguez's view (Cheatham testimony, 12 Tr 57) (20a). Mr. Cheatham also agreed that there is some substance to Rodriguez's view that private school officials' complaint was attitudinally derived (Cheatham testimony, 12 Tr 59) (21a).

In addition, Mr. Cheatham indicated that there was no comparative study of the results of various types of Title I instructional programs (Cheatham testimony, 12 Tr 132-135) (31a-33a). Nevertheless, 99% of the Title I programs in the country are on-premises during hours programs. However, in the early '70s mobile reading labs were popular. (Cheatham testimony, 12 Tr 93-94) (23a-24a).

The government indicated that the Board of Education considered holding the remedial classes for nonpublic school students in the public schools during school hours, but that this plan was abandoned because of concerns that it would violate the New York Constitution (Brief for the Secretary of Education, p. 9).[14]

In *Wheeler* v. *Barrera*, *supra* at 424, n.20, this Court set forth a listing of possible Title I programs suggested to the Senate Committee which was dealing with Title I legislation. This list included instructional media centers, television and radio instruction, and mobile learning centers. Each of these suggestions would provide a less entangling alternative and a more religiously-neutral arrangement for the providing of Title I services to students attending nonpublic schools. The government has failed to demonstrate why these or other alternatives would not be viable. See also *Wolman* v. *Walter*, *supra* at 247, n.14 for a discussion concerning the use of public centers or mobile units near the nonpublic school premises; also *Wheeler* v. *Barrera*, *supra*, at 425, suggesting the use of neutral sites to replace on-the-premises instruction.

CONCLUSION

In attempting to cope with the day-to-day reality of a similar program, the Rhode Island Federal District Court faced the question squarely and held, "[a] parochial and a public school are not merely sharing in a building; they are sharing the same students. The two schools at best effectuate a partnership, if not for all intents and purposes a complete merger. Extensive contacts between the two facilities and administrations are inevitable as they seek to protect the welfare of their common

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[14] In an illuminating article dealing with the constitutionality of Title I, John W. Calhoun, the Assistant Attorney General in Wisconsin, has suggested that the on-premises program should be scrapped in favor of a dual enrollment program. The author suggests in his article that "a Supreme Court ruling establishing dual enrollment as a constitutional right of students attending nonpublic schools" would facilitate such a solution. Calhoun, "The Elementary and Secondary Education Act and the Establishment Clause," 9 Val. U. L. Rev. 487 (Spring, 1975).

student body. . . ." *Thomas* v. *Schmidt*, 397 F.Supp. 263, 214 (D. R.I. 1975).

A Title I program providing for services administered by public school teachers within the confines of a church-operated school fails both the primary effect test and entanglement test and must be struck down. In order to be faithful to the teachings of this Court, the Title I program for nonpublic school students should be provided at neutral sites. Therefore, the holding of the Court of Appeals should be sustained.

Respectfully submitted,

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APPENDIX

APPENDIX

DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION
JEFFERSON CITY, MISSOURI 65101
January 22, 1976

ARTHUR L. MALLORY, COMMISSIONER

Honorable T. H. Bell
U.S. Commissioner of Education
Office of Education
Washington, D.C. 20201

Dear Commissioner Bell:

Thank you for arranging the meeting between members of our staffs in Washington on January 15, 1976, to discuss the Title I, ESEA "by-pass" issue. From the reports received from P. J. Newell and Otis Baker, the meeting provided an excellent opportunity to exchange views concerning regulations and the provisions for a by-pass in the Title I Act.

As you are aware, superintendents representing nonpublic schools met with the State Board of Education on December 8, 1975, and asked the State Board to consider joining with them in approaching your office about a Title I by-pass in Missouri. The State Board asked the staff to study the Title I by-pass provisions and the court cases and make a report to them at their January 18-19, 1976, meeting. The staff made their report to the State Board and, after due consideration, the State Board of Education unanimously agreed to decline to participate in a request for a Title I by-pass and to await the outcome of the court cases now pending before taking any further action.

Missouri has worked hard to make comparable services available to nonpublic schoolchildren. After studying the Act, the regulations and guidelines and the U.S. Supreme Court Opinion in *Barrera* v. *Wheeler*, we developed the *State Plan for the Administration of Title I, ESEA Services to Nonpublic*

Schoolchildren in Missouri (copy enclosed). Judge Collinson, U.S. District Court for the Western District of Missouri, reviewed the State Plan and agreed that it would offer the opportunity for comparable services to nonpublic schoolchildren and so stated in his Order of August 14, 1975, in which he approved the State Plan. (That Order has been appealed to the U.S. Court of Appeals.) The Plan was specifically developed with the following facts in mind:

1. On September 12, 1966, in *Special District of St. Louis County* v. *Wheeler*, the Missouri Supreme Court ruled that (a) sending public schoolteachers paid with public funds into parochial schools was unlawful and invalid, and (b) sending parochial schoolchildren to public schools for part of their regular school day contravenes the state compulsory school attendance law.

2. In its June 10, 1974, Opinion in *Barrera* v. *Wheeler*, the United States Supreme Court stated:

   a. "At the outset, we believe that the Court of Appeals erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri Law. Whatever the case might be if there were no expression of specific congressional intent, Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting federal funds."

   b. "The key issue, namely, whether federal aid is money 'donated to any state fund for public school purposes', within the meaning of the Missouri Constitution, Art. 9, § 5, is purely a question of state and not federal law."

   c. "The correct rule is that the 'federal law' under Title I is to the effect that state law should not be disturbed. If it is determined, ultimately, that the petitioners' position is a correct exposition of Missouri law, Title I requires not that that law be preempted, but rather, that it be accommodated by the use of services not proscribed under state law. The question whether Missouri law prohibits

the use of Title I funds for on-the-premises private school instruction is still unresolved."

Note: The State Board of Education's position was found to be correct by the Circuit Court of Jackson County in *Mallory* v. *Barrera*, September 2, 1975. The Court ruled (a) that funds paid under the provisions of Title I, ESEA, to the State of Missouri are required to be deposited in its State Treasury, are to be appropriated by the General Assembly, are subject to withdrawals according to warrants issued by the State Board of Education, and are to be expended by public school districts in a manner consistent with Missouri's Constitution and school laws, and constitute public funds which are subject to the spending proscriptions of Article I, Section 7; Article III, Sections 36 and 38(a); Article IV, Sections 15 and 28; Article VI, Section 23; and Article IX, Sections 1(a), 2(a), 2(b), 5 and 8 of the Constitution of Missouri and implementing statutes; and, (b) that Missouri law prohibits, and does not permit or require, the sending of public school personnel, paid with funds under the provisions of Title I of the Elementary and Secondary Education Act of 1965, onto the premises of private, sectarian and nonsectarian schools during regular school hours to provide teaching services to private schoolchildren eligible to receive such services under said Act. (This case has been appealed to the Missouri Supreme Court.)

d. "Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different than those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area . . . Title I was not intended to override these individualized state restrictions. Rather, there was a clear intention that the assistance programs be designed on local levels so as to accommodate the restrictions."

e. "Inasmuch as comparable, and not identical, services are required, the mere fact that public schoolchildren are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical provision for private schoolchildren."

f. "First, the State may approve plans that do not utilize on-the-premises private school Title I instruction, but, nonetheless, still measure up to the requirement of comparability."

g. "In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools."

h. "To place on this Court or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies."

i. "It is clear, however, that the Act places ultimate responsibility and control with the public agency, and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests."

We feel that the State Plan alluded to earlier, which was approved by Judge Collinson on August 14, 1975, is in compliance both with the letter and the intent of the State Constitution and implementing statutes, Title I, ESEA and its regulations, and the Opinion of the United States Supreme Court in the Barrera Case. In his Order approving the State Plan, Judge Collinson stated with reference to the Supreme Court's Opinion in *Barrera* v. *Wheeler:*

> "The Opinion in several places makes the point that 'comparable' does not mean 'identical' and that the Act itself does not require that identical services be provided in nonpublic schools."

It seems to me that the possibility of a by-pass is focusing on the definitions of or criteria for determining "comparable", "equitable", and "genuine opportunities to participate" with respect to services for nonpublic schoolchildren. In the development of the State Plan, approved by Judge Collinson, our staff and legal counsel gave careful attention to requirements for "comparable" services by reviewing the U.S. Supreme Court Opinion of June 10, 1974, in the *Barrera* v. *Wheeler* case, with special consideration to the following excerpts:

a. " 'Comparable', however, does not mean 'identical', . . . we do not read the Court of Appeals' opinion or, for that matter, the Act itself, as ever requiring that identical services be provided in nonpublic schools."

b. "Footnoted 11—The Act itself does not mention 'comparability'. It requires only that the state agency, in approving a plan, must determine 'that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special education services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.' 20 u.s.c. § 241e(a)(2). The Regulations, 45 CFR §§ 116.19(a) and (b) (1973), are the source of the comparability requirements. See n. 6, supra."

c. "Footnote 6—The regulations state: 'Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation.' 45 CFR § 116.19(a) (1973).

'The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private schoolchildren, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools.' 45 CFR § 116.19(b) (1973)."

d. "Footnote 14—HEW's Office of Education refers to the comparability requirement as follows:

'The needs of private schoolchildren in the eligible areas may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public schoolchildren with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project are in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children.' USOE Program Guide No. 44, 4.5 (1968), Handbook, at 41-42. See 45 CFR § 116.18(a)."

e. "Footnote 16—The United States, as *amicus curiae*, states:

'Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private schoolchildren (e.g., prohibition against dual enrollment). Accordingly, Title I programs may be provided in a different manner to private and to public schoolchildren. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the 'special education needs' required to be met under 20 U.S.C. 241e(a)(1)(A) of the two groups differ (footnote omitted).' "

f. "In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools."

We have been hopeful that, among the growing list of United States Supreme Court rulings on the church-state issue as it applies to education, one or more cases could be construed to have general applicability to our own circumstance. Although there are those who disagree, we are convinced that the Opinion of the U.S. Supreme Court, in *Meek* v. *Pittenger*, issued on May 19, 1975, provides the answer to the church-state issue as it relates to Title I, ESEA and should be construed as the controlling case at this time. In *Meek* v. *Pittenger*, the Court ruled on three provisions for public assistance to nonpublic schoolchildren and to nonpublic schools under Pennsylvania statutes. Their constitutionality was challenged under the "establishment clause" of the First Amendment to the United States Constitution. In overturning the "auxiliary services" provision of Pennsylvania Act 194, under which publicly paid personnel were providing remedial and accelerated instruction, guidance counseling and testing services, speech and hearing services to nonpublic schoolchildren during the regular school day on nonpublic school premises, the Court stated:

> "Whether the subject is 'remedial reading', 'advanced reading', or simply 'reading', a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists."
>
> "To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed."
>
> "In addition, Act 194, like the statutes considered in *Lemon* v. *Kurtzman*, supra, and *Committee for Public Education and Religious Liberty* v. *Nyquist*, supra, creates a serious potential for divisive conflict over the issue

> of aid to religion—'entanglement in the broader sense of continuing political strife.' "
>
> "This potential for political entanglement, together with the administrative entanglement which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws 'respecting an establishment of religion.' "

In his Decree of September 2, 1975, in *Mallory* v. *Barrera*, Missouri Circuit Court Judge Sprinkle declared in his conclusions of law that" . . . the conducting of instructional services by public schoolteachers on parochial school premises necessarily requires continuing and excessive entanglement which is impermissible under the Establishment Clause of the First Amendment. *Meek* v. *Pittenger*, 95 S.Ct. 1753 (May 19, 1975), Slip Opinion, at 17-22."

In addition to the clear implications of *Meek* v. *Pittenger*, in the U.S. District Court's Order issued on August 14, 1975, the Judge stated it was the belief of that Court that sending public schoolteachers into private schools during regular school hours would be in direct violation of the prohibitions of the First Amendment of the U.S. Constitution.

According to an article in the January 21, 1976, edition of The Kansas City Star (copy enclosed), it would appear that representatives of nonpublic schools will request you to consider the by-pass in some or all of the local educational agencies serving nonpublic schoolchildren through their Title I programs. While we believe that comparable services are being provided under the present State Plan in Supreme Court Opinion in *Barrera* v. *Wheeler*, I understand that some of your people may not agree and you may decide to exercise your authority to implement by-pass procedures in Missouri. In such case, the affected local school districts and the State Board of Education will be concerned about the amount withheld from each affected district's Title I allocation to provide services to nonpublic schoolchildren. We believe the amount to be withheld from a district's Title I allocation should be determined on a numerical proration basis.

Our concern about the amount of funds withheld results from our experience with the by-pass under Title III, ESEA. Since the allocation under Title III is on a state basis, the excessive withholding has not so directly affected individual children within a local educational agency. Excessive withholding under Title I, however, would be detrimental to educationally deprived public schoolchildren in the affected school districts and would result in discrimination against such children.

Ted, this has been a long letter, but I felt it necessary to set forth what we believe to be persuasive arguments for the position we have taken in the administration of Title I, ESEA services to nonpublic schoolchildren in Missouri. There is doubt in the thinking of some people that the issue of public services for nonpublic schoolchildren has been settled by the courts, but, personally, I believe it has been settled by the U.S. Supreme Court in *Barrera* v. *Wheeler* and *Meek* v. *Pittenger* and by the Missouri courts in *Special School District* v. *Wheeler* and *Mallory* v. *Barrera*. I do not believe that we should attempt to do by indirect means that which we cannot do by direct means.

Respectfully yours,

Commissioner

Enclosures

COMPENSATORY EDUCATIONAL PROGRAMS

FROM THE DESK OF

the Associate Commissioner

June 24, 1976

NOTE TO BOB WHEELER

The non-public school officials who complained about Title I services in Missouri seem to base their complaint in part on the assumption that before or after school services are "inherent-

ly" not equitable if public school students receive such services during the school day. There is no empirical evidence to substantiate or support this assumption. It is attitudinally derived.

There is, however, substantial evidence that a positive correlation exists between the quantity of education and school achievement. From this evidence we can deduce with reasonable justification that before or after school, school services increases the quantity of a student's education and therefore benefits him in excess of what he would receive if services were provided during the school day. It is assumed in this deduction that quality education is being provided. Serious attention should be given this argument. I am willing for the sake of argument in our session on the by-pass report with the Commissioner to take such a position.

/s/ JOHN

[24]

A. Yes.

Q. And who was that?

A. Pete Cole.

Q. Did he ever visit you and your school before Dr. Wamble's visit? I am talking about during the time that the Title I program was operational in your school and being conducted by Blue Hills.

A. Yes.

Q. Do you recall him ever discussing the crucifix, and the presence of it, in the room?

A. No.

Q. Did anyone from Blue Hills Homes Corporation, before Dr. Wamble's visit, ever ask you to remove the crucifix from the room?

A. I don't recall that they did.

Q. All right. You have indicated that Dr. Wamble did visit the room. Did anything occur with reference to the presence of the crucifix after Dr. Wamble's visit?

A. Yes.

Q. And what did occur?

A. The crucifix was removed.

Q. Now, can you tell me what discussions occurred with reference to that? In other words, who contacted you first about the removal of the crucifix?

A. I don't recall if it was Mr. John Schmiedeler or whether [25] Blue Hills did. I don't recall which one did.

Q. In any event, somebody contacted you?

A. Yes.

Q. Did both of those individuals talk to you about it?

A. I don't recall.

Q. And who removed the crucifix?

A. That I am not positive either, whether Mr. Schmiedeler did or someone else from his office. I don't recall exactly who did it.

I think in my deposition I said Mr. Schmiedeler did, but then I talked to several people about that afterwards, and I am not sure.

Q. I appreciate that. Did you ever speak with the administrator of the school with reference to the crucifix?

A. Yes.

Q. And what occasioned that discussion?

A. Pardon me?

Q. What occasioned that discussion? What brought that about?

A. The fact that I was told to take it down.

Q. Can you tell me whether the administrator brought the matter up to you, or did you bring it up with the administrator?

A. Most probably I brought it up to him.

Q. And what was the purpose of your discussing it with the administrator?

[26]

A. At that time we also had a school board, and any big decision I would always discuss with both of them.

Q. And did you take this matter to both the administrator and the school board?

A. Yes.

Q. Did you consider it to be a big decision?

A. Yes, I did.

Q. You consider a crucifix to be a sacred object?

A. Yes.

Q. And what do you understand, at least your opinion, based upon your experience, the significance of that religious object to be?

A. The significance would be that our school is a Catholic school, and it was an object of reverence we had in our classrooms.

Q. Did the other rooms in your school also have a similar religious object somewhere in the room?

A. Yes.

Q. And was it generally placed in the same location?

A. Generally so.

Q. Did you ever receive any kind of written communication from anyone from Blue Hills concerning the presence of religious objects in the Title I room?

A. Yes. I am not sure if it came from Blue Hills or from the school office, diocesan school office.

* * *

[149]

Q. In any event, it hasn't made any particular impression on you?

A. If I don't recall it, I guess you would have to draw that conclusion.

Q. You have some fourteen thousand what, these are school districts?

A. Local school districts that participate in Title I.

Q. How many of these local school districts did your monitoring team get around to observe?

A. Oh, in a year?

Q. In a year.

A. Less than one percent, my staff.

Q. And we are talking about one percent of the fourteen thousand districts—

A. For a given year.

Q. For a given year. And there are, I assume, usually many schools within the school district?

A. That's right.

Q. So we are talking about a very small fraction of the schools that your monitoring team would ever go in and see?

A. That's right. We also, however, receive reports from [150] state agency monitoring teams that have been required to review each school district on the three-year basis generally, every three years they have to visit the school.

Q. They would give you reports, I would assume, in the event they find any violation of the regulations and guidelines and requirements of the federal government?

A. Yes.

Q. But you don't have any regulations or requirements with guidelines with reference to a religiously neutral setting, do you?

A. We have guidelines on public control. No, I believe I have answered that.

Q. How would you get any monitoring reports or even be apprised, based on what you get back from the state, as to their problems they might perceive with reference to the—

A. I am not sure we have ever defined religiously neutral setting.

Q. You know that is in the current contract that is in existence between the Blue Hills Homes Corporation and the federal government.

A. I can't tell you that I know all of what is in those contracts. No, I did not know that language was in there, specifically. I know that that is generally what we expect, that it be a religiously neutral setting. And that [151] is what we find generally. But, you know, when a room looks too much like a chapel, I mean—I don't know of a list of things that you look for.

Q. Let me ask you this because you put your finger right on it, you don't know when it finally reaches that level, do you?

A. No. I don't know.

Q. It would require somebody on the site to make that judgment?

A. That's right.

Q. Did you ever visit Puerto Rico while you were in charge of the northeast region?

A. Yes.

Q. Did you ever go into the non-public school, Title I rooms there?

A. Yes.

MR. NESLER: Objection. This line of questioning is totally irrelevant.

MR. BOOTHBY: I will withdraw the question.

THE COURT: It is withdrawn.

Do you feel you are drawing reasonably close to the end of your examination?

MR. BOOTHBY: I am always reasonably close. This would be an appropriate time.

THE COURT: Let's take our afternoon break and

* * *

[41]

Q. (By Mr. Boothby) Generally speaking.

A. That's my understanding, generally.

Q. Do you ever make a determination, in providing this service, what was going on in the rest of the school room is of a sectarian character, and you go into the degree of religiosity?

A. No. When we go into a school operated by the Lutherans, Catholics, or anyone else, we know it's a school that includes the teaching of religion. That's no surprise. We would be surprised if they didn't teach it.

What we go into—and we generally go to a principal's office and we go to a Title I classroom, or a facility. They put them in different places. Most of the time we are

talking about a Title I classroom. That's really what we pay attention to.

Q. Let me ask you this question. If it was brought to your attention—I am talking about your application of the statute and your regulations—if it was brought to your attention that the Title I program was being conducted within a school, in a room within a school made available by the school, where you learned that the school was controlled by churches or religious organizations, had as their purpose the teaching, the promulgation and promotion [42] of a particular religious nature, conducted their operations, curriculums and programs to fulfill that purpose, they impose religious restrictions on admissions; the required attendance at instructions in theology and religious doctrine; they required attendance or participation in religious worship. And you were told by them that their whole operation was an intregal part of the religious sponsor of the mission. They have as their substantial purpose the inculcation of religious values. They impose religious restrictions on faculty appointments. And they impose religious restrictions on what the faculty may teach.

If you were told all of those things were present in that school, it was admitted, would there be anything in your Title I requirements, your regulations, as you apply it, that would cause you to say we cannot provide the Title I services in a Title I room in that school?

MR. NESLER: Objection to the form of the question, Your Honor. Also object to the question. It's a hypothetical and there is no evidence of any of the schools in Missouri in which Title I services are offered has any or all of those characteristics.

THE COURT: Overruled.

A. Mr. Boothby, we don't get a review of all of that. However, there was one thing where you said the students, all the [43] students had to be a member of a certain religious faith.

Q. (By Mr. Boothby) I said there were restrictions.

A. Oh, restrictions. In other words, 60 percent of the enrollment had to be Lutheran or Catholic, or something like that; is that what you mean by restrictions?

Q. Or it could be that they would give preference.

A. Your specific question related to all of that, is there anything in the regulations that say that is a violation?

Q. Anything that would cause you to withhold providing Title I services to the students at that school within the Title I room, within the abdomen of the school?

A. Mr. Boothby, that was such a long list of things you read. I would just generally respond that I can't think of anything that would specifically violate a private school, non-public school, that happens to be operated by a religious group. The understanding is that they teach that religion. How much they teach it, how forcefully they teach it, does not become an issue unless the federal funds are involved in the teaching of that religion.

If we go into a classroom and find Title I inventories stamped in religious books, we have got a problem. And we would cite them for such a problem.

If we went in a room and a Title I teacher was teaching children how to say their prayers, we would view that as a violation.

[44] And I have been in hundreds of classrooms, and probably thousands, and in private schools, I would say certainly hundreds. And the problems we have had almost always related to whether or not the child resided in the appropriate attendance area in order to be considered in Title I. It was not an issue of whether they were teaching Bible, or whether—I mean, all of those, the religious issues.

I have never been in a classroom where I saw a crucifix or an image. I just never have. And I have been to a lot,

hundreds of classrooms. And as I said, I have had reports of that to me by members of my staff, but I must tell you, that has been my experience.

Q. So there is no question that you don't say that there is a certain class of schools, because of their being too religious in character, they cannot be a site where you provide the services?

A. If we went into a Catholic school, for instance, we would look for things. We would not necessarily look for something in a so-called Montessori school. There are a lot of private schools called the Montessori approach. Generally, they are not in low-income areas. But if they were, we would tend to look for different kinds of things and to inquire about different issues. But because the school teaches religion and serves more people of one [45] religion than another, I don't know that we have ever gotten into that.

Q. Now, you brought up something. How do you monitor a situation where a person of the same religious persuasion is teaching in a Title I room in a school of the same persuasion as that particular teacher? How do you monitor what the discussions are in that particular classroom, Title I classroom? I am not asking you to tell me what goes on, but I want you to tell me how you monitor what goes on.

A. We monitor what goes on, not by a review, word-for-word of activities, but a review of materials, a review of the objectives for the program, whether or not the objectives are being implemented.

We review the individualized program folders. We have learned since the early '70s, a disadvantaged child needs an individually prescribed program to be implemented to be the most effective program. We look at that. And again, they are using SRA materials, which is something that we see quite often. We review those materials. We are pretty familiar with them, but we don't monitor every

example that a teacher gives to a student to determine whether or not it's religious, whether it's in a public school or non-public school.

Q. Let's not talk about material. Let's talk about discussions. [46] Is there any way you can monitor discussions?

A. Only when we are present.

Q. And you have indicated you have 14,000 school districts to monitor?

A. That's right.

Q. And how big a staff do you have to monitor?

A. Oh, our staff ranges from 70 to 125, depending on the circumstances, in terms of administrative, salaries and expenses available.

Q. Let me explore something with you. Did you have any elementary and secondary training in a public school?

A. In a public school, no.

Q. All in a private school?

A. That's right.

Q. A church-operated school?

A. That's right.

MR. NESLER: Objection to the relevance of this to anything concerning Title I in Missouri. I don't believe Mr. Cheatham's educational background, where he went to grade school or high school has any bearing on the issues in this case.

THE COURT: On the contrary, I think it's quite relevant. I am going to overrule the objection.

Q. (By Mr. Boothby) Were the schools that you attended, schools where religion was taught in more than just the

* * *

[57] opinion that you did as to the benefit of an after-hours program.

A. Yes, that's what it indicates. He had a different opinion.

Q. You notice in this statement that he indicated in a notation to the Commissioner, to Bob Wheeler, "The non-public school officials who complained about Title I services in Missouri seem to base their complaint, in part, on the assumption that before or after-school services are inherently not equitable if public school students receive such services during the school day. There is no empirical evidence to substantiate or support this assumption."

Do you know of empirical evidence to refute that?

A. No. Really, this whole issue he is discussing really is why we went on site and conducted the investigation, because we couldn't sit back in Washington and make a decision they were out of compliance because they had after-school programs.

Q. I agree with you, but did you, in your search, attempt to locate empirical evidence from the standpoint of data, hard data, to refute what Dr. Rodriquez said in this memorandum?

A. Well, no. All I can tell you is that in all of our discussions with qualified educators, none of them—you had qualified people as your superintendents, as your assistant superintendents, people with doctorate degrees [58] in education, none of them recommended an after-school program. None of them said they would have considered it for the public school children for a number of reasons. And I know of no study that shows that after-hour programs are as effective or more effective than regular hour programs, especially for disadvantaged children.

Q. You notice in the next paragraph he states, "There is substantial evidence that a positive correlation exists between the quantity of education and school achievement." Then he deduces from that that the additional time would be beneficial.

A. Mr. Rodriquez, I consider him a friend, but he doesn't support his statements. He is making statements, he doesn't support them. He doesn't footnote them. He doesn't refer to any studies. He had a problem with this whole issue.

Q. Just one question and I am through. When he made this statement, had he seen your on-site investigation?

A. I really do not know. He certainly was in the meetings when we planned it, June 24, 1976, I doubt we had a first draft of the results.

Q. He was aware of your findings?

A. By then, we would have discussed certainly what we had found, what we had seen.

Whether or not he was in those meetings or off involved in other activities, I just don't recall.

[59] MR. BOOTHBY: I will pass the witness.

THE COURT: Before you examine, Mr. Nesler, Mr. Cheatham, Mr. Rodriquez makes a statement in Exhibit 977, in the first paragraph that, "The Assumption that before or after-school services are inherently not equitable if public school students receive such services during the school day is attitudinally derived." Do you agree with that?

THE WITNESS: Your Honor, the attitudinally derived, I think there is some substance to that statement. And I am not trying to be evasive. I am just saying that we were not dealing with the inherently. We went out to determine whether it was or wasn't. I must say that there is generally a negative response in the educational community to extended hours for school programs, especially for the disadvantaged. That has been my experience.

THE COURT: Now, is it critical to that attitude toward this kind of a program, that other students, be they public

school or other private school students, I don't care in this context, be receiving such services during the school day?

THE WITNESS: Your Honor, I believe that it's at the comparable opportunity to participate.

I believe I said if all of the children had to [60] jump over the same hurdles, as it were, to get their services, there would have been a lot less question than if just this particular group of children were treated one way and another group treated another way.

THE COURT: Of course, the statutory language is equitable, not comparable, isn't it?

THE WITNESS: Yes.

THE COURT: We have been dealing with comparable right along.

THE WITNESS: But equitable, whether or not it is equal, I see that word as meaning equal treatment. Are the facilities, the materials, approximately the same quality? Are teachers trained in approximately the same way? They don't have to be the same.

I think we stress in a number of our publications, they don't have to be the same, but within a reasonable range of the other.

THE COURT: We may return to this. Mr. Nesler, do you want to examine on Redirect?

MR. NESLER: Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. NESLER:

Q. Mr. Cheatham, I would just like to ask you a few questions about your cross-examination this morning before we return to events of yesterday.

* * *

[93]

MR. BOOTHBY: During what time period?

MR. NESLER: During the time period prior to the bypass.

A. Well, I can't remember Missouri saying a lot during those sessions. Mr. Baker is quite a strong leader in his office and strong spokesman for that office.

I remember specifically at one conference where Mr. Baker addressed kinds of services that we were suggesting as appropriate as, in his view, not appropriate.

Q. Why did he say they weren't appropriate?

A. Because they were delivered on private school premises during the regular school hours.

Q. That would be the basic type of service you were referring to, or suggesting?

A. In 99 percent of the programs, that would be a part of the appropriate description of the services to non-public school children, would be on premises during the regular school day, whether it was in a mobile van parked on the premises or temporary classroom, or in the building.

Q. Are you saying that is how everybody else did it?

A. Yes, with very few exceptions. In small towns, it's not unusual for students to all go to one school during the day to receive services because of small groups, or for a teacher to travel—for awhile we were giving a lot of business to people with the mobile reading labs in the [94] early '70s. They would just drive them around. The children would come out and stay in the lab for 45 minutes, receive their services and go back in the non-public schools. But today, most of the services are provided on premises.

Of the 14,000 school districts, most of them, Your Honor, are small; probably people go in for an hour or two during the day and then leave, provide services. They are not there all day.

THE COURT: Is Missouri the only state in the Union which has, or at least is enforcing Constitution or statutory law which prohibits that kind of a program for Constitutional purposes?

THE WITNESS: I believe it has the strongest enforcement. We have some real problems in the state of Virginia, but I don't believe our bypass program in Virginia is as broad. I think in terms of what local school districts do in Virginia is a little spotty. I don't believe, for instance, that the state agency would disapprove a project—I am getting into an area I am not that familiar with, in terms of Virginia. Certainly the situation in Missouri is different than any other state.

THE COURT: In stating the question, I should have said statutory Constitutional law, which it is intended,

* * *

[114]

Going to something you suggested either yesterday or before, my view is that we are not overly aggressive in this area. We did provide guidance in this handbook, I believe, in the early '70s because we wanted to assist state and local in getting more children in the program. But I can't tell you whether we are nationally missing 50 percent of the children or 10 percent of the children that ought to be in this program.

Q. I am concerned about one statement you made while you were testifying. Did I understand you to say that if the non-public schools didn't elect to participate, perhaps you would find that there was no violation in failing to supply the services to non-public school students?

A. Sure. Most of the Seventh Day Adventist schools elect not to participate. We don't hold the local school districts in violation.

Q. You picked the Seventh Day Adventist. What if a Seventh Day Adventist disadvantaged child, ranging at the 10th

percentile, desires to receive Title I services, is in the target area, tenth percentile, he is in the state of Missouri; his parents want to send him to a Seventh Day Adventist School; he is attending a Seventh Day Adventist school. They have religious reasons for sending the child there. He can't get Title I services in the public school, [115] can he?

A. Not in Missouri.

Q. How would he get it from the Catholic or Lutheran school?

A. Oh, that's a hypothetical. I would think some arrangements could be made for that. We are talking about one student. I don't think the Department would get terribly upset if that one student was transported, if the parents wanted, over to the remedial reading program at the Lutheran or Catholic school.

Q. What if the parents don't want him in that situation?

A. Mr. Boothby, based on the appropriation from Congress, we are missing half of the children, one-half. We don't guarantee services to every child.

The local would be told to counsel with those parents to see if there was a way to work it out. But in many communities, students both in public schools and private schools are not being served. In all communities, no more than half of the children should be served. I am talking about nationally. But when you look at the appropriation from Congress, Congress figures they are putting money out in accordance with about 50 percent of the needs.

Maybe that Seventh Day Adventist would miss out. That would not be, per se, a violation.

Q. Are we serving the school or are we serving the child?

[116]

A. Serving the child. I think that is one thing that is very unique about Title I, is that we are not talking about a program where you are building buildings and refurbish-

ing buildings, and buying a lot of equipment and leaving it in schools. You are talking about a program that is oriented services toward children. If the services are discontinued, the equipment is withdrawn.

Q. But under the bypass arrangement in Missouri, as I understand it, if a school decides that they don't want to have the federal government's people coming in and teaching remedial reading to their students, if they decide that, then the child cannot receive Title I services?

A. Under the bypass, the only way that I know that we would deliver services under the bypass would be in the non-public school, or in cooperation with the non-public school.

If that school principal said, I don't want to participate, then the children would lose their services. Is that your point?

Q. That's my question.

A. That's right. We don't force, under the bypass, private schools to participate.

Q. But if a private school decides to participate and they have, I think in Missouri, you have to have 10 or 12 students, then the program is effective and the students in that school that are eligible, they receive the service?

[117]

A. That's right.

Q. I represent to you that Mr. Baker, Otis Baker, when he was testifying, said he would service under the public school arrangement, one child, whether they were going to a Baptist school, an Adventist school, or the public school.

Do you take that into consideration when you decide whether the bypass arrangement is the best way to service all disadvantaged children that are eligible?

A. My statement is that if Mr. Baker has enough money in Missouri to serve every eligible child everywhere, includ-

ing the non-public schools, then I think Congress would want to take a look at the formula for Missouri. He can't have enough money to do that and design a program that has size, scope and quality. I mean, the terms "size," "scope," and "quality," also apply to any program.

That's why we say, providing a movie projector is not a program; that the program involves more than materials. It involves a visit once in awhile from a social worker.

So if Mr. Baker made that commitment, my experience is, he would have a very difficult time, other than just watering down the program statewide, in delivering on that.

I would also suggest that that probably would not be appropriate unless he is serving every child in [118] the public school. And my understanding is, in every state, every child in the public school is not being serviced. I think if we look back at our report, we would show on page after page, there are 695 children in Jefferson City eligible. They only intend to serve 145. That's the routine.

Q. I am talking within the criteria.

A. This is within the criteria, educationally deprived, below the fortieth percentile is what that means, in Missouri, 695; how many were participating, 145.

Q. I don't want to misrepresent. I mean, within the criteria established within each LEA, in other words, it might be the thirty-fifth percentile within that LEA.

A. Yes. One way to reduce the number—frankly, as far as the federal government is concerned, any child below the fiftieth percentile is eligible, below grade level. But my experience with the program is that it's impossible to service all the children. And it may not be reasonable to track around servicing one child. That's generally not what we do. I am not saying in some small communities that we don't service one child at a school, but that is the exception to the rule. Generally, we don't.

Q. Can you tell me what the justification is for permitting an arrangement to exist—when this is supposed to be for the benefit of children—to have the church-operated [119] school where the child is attending, determine the participation, the benefits, the governmental benefits, which a child will receive?

A. The church deciding governmental benefits?

Q. In essence.

A. Private schools, Mr. Boothby, you are familiar with them. They have all sorts of rules. Some say you can smoke and others say you can't. The parents know what the rules are when their children enroll in those schools. And I believe that the average Seventh Day Adventist parent knows if their child enrolls in a Seventh Day Adventist school, they are not likely to participate in any federal program. That's traditional, at least at elementary and secondary.

THE COURT: He knows there is an amendment to the Constitution of the United States which prescribes establishment of religion, or entanglement of the government in religious activity, and that is true of parents who enroll children in Adventist schools, or Catholic schools, or Lutheran schools.

THE WITNESS: I think the average parent knows that, Your Honor, yes.

THE COURT: Now, in making the decision whether there are equitable services provided, is that fact fed into your equation?

THE WITNESS: The Constitutional question?

[120]

THE COURT: The awareness of parents of the difference of their children from the other children by making the decision to send them to religiously-oriented schools.

THE WITNESS: I can't tell you how we factor that in. Different religions deal with federal programs differently.

Some religious groups, assistance at higher education, seems to be okay. Elementary and secondary, it's not okay.

I am really not that familiar with how that is determined, and I would think that the average parent probably isn't that clear on it. But I really don't have any information on that.

THE COURT: Thank you.

Q. (By Mr. Boothby) Let me ask you this. Would you accept the proposition, based upon your experience, not only in the Department of Education, but the Department of Civil Rights, HEW, that every citizen in this country is entitled to equal access to governmental benefits that he is statutorily qualified to receive, irrespective of his beliefs and practices?

MR. NESLER: Objection, Your Honor. I believe that calls for a legal conclusion on the part of the witness that he is not competent to give.

[121]

THE COURT: It certainly calls for something of a conclusion on his part, but I think considering the critical role he plays in the administration of this program, that it might be of interest to us to know what his views are.

A. Your Honor, I just have difficulty with that question knowing that there are all sorts of services that the government makes provisions for, but then they don't fully fund them. The government knows in the beginning, some people are going to get it and some people aren't. And that's the case in Title I and always has been.

From that vantage point, I don't know how to answer that. I think so many things come into play. Is it discrimination when the government doesn't fully fund a program? It makes it impossible for everybody to receive the services that the government acknowledges are needed.

Q. (By Mr. Boothby) Let me ask you one question and then I will drop it and get to a couple other things. Based on your experience, you have mentioned about Adventist schools.

A. Yes.

Q. Do you have experience that the so-called Christian schools, are you familiar with the Christian schools as a movement?

A. Yes.

Q. Do they always resist the government coming into their schools?

[122]

A. Some do and some don't.

Q. So to the extent that they do, there would be a similar problem there?

A. That's right.

THE COURT: One question on that. Do you have Title I programs in Christian-evangelical, or evangelical-Christian schools?

THE WITNESS: Yes. It is different in different areas. I think probably not information that is not available to probably some of the hierarchy of the Seventh Day Adventists. I have been to some towns where the Seventh Day Adventist schools are participating and it seems to be kind of a local determination. But in some parts of the country you find Christian schools, you find Lutheran schools, you find non-denominational schools.

You go to the next state and you wouldn't find anything but Roman Catholic schools participating.

THE COURT: All right. Thank you. Go ahead.

Q. (By Mr. Boothby) You discussed a little bit about this equitable basis, or we have talked in terms of comparable services. We have used varying terms.

In any event, you have mentioned that that really means, at least size, scope, quality and opportunity to participate as I understand it.

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[132] is the section beginning on page 30, item D. I believe that's a summary of what the principals said about the program that is being offered.

MR. BOOTHBY: I can't tell from the paragraph. Perhaps the witness can answer that.

A. This is the information as they reported it to us under that Section D. This is not a statement attempting to summarize on behalf of the government, a conclusion. We were reporting findings. We summarized findings at the beginning. We really didn't report conclusions and recommendations and next steps in this report. But this is a rundown of what various people told us.

Q. As far as the Catholic principals are concerned, though, in essence, they told you the essential differences had to do with the hours?

A. Yes, that's what generated the most concern, and then there was the fall-out from that.

MR. BOOTHBY: I have nothing further, Your Honor.

THE COURT: Mr. Nesler?

MR. NESLER: Perhaps the Court has some questions.

THE COURT: Yes, I might. Thank you.

I keep returning to this, Mr. Cheatham, and maybe it is because I don't understand what you have already said, probably more than once; but as I recall your testimony, there was a period of time prior to 1975 [133] when Missouri provided equipment only.

THE WITNESS: Yes.

THE COURT: And that was for a period of about two years, right?

THE WITNESS: That's my understanding.

THE COURT: Now, during or after that two-year period, was there ever conducted any comparative assessment of the results of the public school, vis-a-vis the public school programs in Missouri at that time?

THE WITNESS: Pre- and post-test evaluation?

THE COURT:The Court: Right.

THE WITNESS: I am sure the State of Missouri provided evaluation reports for each year. Evaluation reports are something that states provide copies of to the federal government. But until the late '70s, there was no national evaluation; it was a state-by-state. But I would be very surprised if Missouri did not have an annual evaluation report, which would include some information on those programs.

THE COURT: If you were, as an administrator, making the assessment as to the relative equality of services being offered one segment of the population as opposed to another, and your money figures were roughly, your fiscal figures were not the same, but [134] comparable—I wanted to avoid that word—but the bottom line was that, as a matter of fact, both groups were performing or improving their performance at an almost identical rate. Now, also, one group was there at different times of the day, or their parents had to go get them and take them at an inconvenient time and all that sort of thing. The fact is, they got the goods and they were performing well. Now, how would you evaluate, then, those two programs? Would they be comparable programs, equal programs?

THE WITNESS: If the results were comparable, would the programs be determined to be comparable if the input was not comparable? No, I believe our focus would be on the input part. The results we would be interested in, but

we really don't have as firm a handle. For instance, there are those who say you shouldn't fund the unsuccessful programs after one year. If they are not successful, don't give them any more money.

The program is a formula grant. The money is generated by the Congress every year, and while we have models for good programs and we say that you can't waste the money, we have never made hard compliance determination based on results, that [135] California is going to continue to get its money because it is effective; Texas isn't going to get its money because they are not as effective. Under the latest regulation, we can ask very few questions about results. It is determined to be more of a local and state matter and federal concern. So we have kind of been back and forth on that.

In the late '70s, we got our hands into this result. We had national evaluation; we had three national models. We could compare what was happening in Missouri to what was happening in Arkansas for the first time. But the recent amendments have gotten us out of that, unless the states voluntarily do that. So we really haven't been that tight on results, Your Honor. It's just, we haven't been allowed to have that kind of control.

THE COURT: I think you have said this, but I want to make sure this record is clear for our purposes. In your ongoing difficulty with the State of Missouri—and I appreciate the fact that you have had quite a bit of it—but as an administrator and the years that you're in the program, in and out of the program and back into it, did you understand that the Missouri Department of Education entertained the view that compliance with your Department's requirement

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[111] presence and intervention at that point.

THE COURT: Okay.

Q. (By Mr. Boothby) Let me represent to you in this case there is testimony, in more than one case, that at least in one that I can think of, where the Title I teacher sent a discipline problem to the principal's room and the principal administered punishment, is that in accordance with your policy and instruction to your Title I people?

A. I told you I wasn't aware of such a situation. But that kid is enrolled primarily in that private school. And that principal is ultimately responsible for that kid.

Q. Let me ask you this, during the time that a student is in the Title I room, from your standpoint, is it your opinion that that student is still under the ultimate control and supervision of the authorities of the private school?

A. I think at that point where the kid is in the Title I room for Title I instruction, the kid is under the supervision and control of the Title I teacher at that point.

I think the discussion we have just entered into, if all else fails and the kid goes to principal's office I don't know that I would get terribly upset about that.

Q. I will represent to you that there is in the record in this case in evidentiary testimony, a statement of a

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[117] MR. BOOTHBY: Since we have an objection, I am wondering whether I should ask a new question or have that previous one asked, whichever way the Court wishes.

THE COURT: The witness has now had the opportunity to examine part of the deposition you asked about. Now, do you have, that having happened, Mr. Nesler, do you continue to object to the question?

MR. NESLER: No, Your Honor.

THE COURT: You may answer the question.

THE WITNESS: What was your question?

THE COURT: Would you read it back, please? (Whereupon, the court reporter read the pending question.)

"I will represent to you that there is in the record in this case in evidentiary testimony, a statement of a principal of a Catholic school that any time a student is on the premises, regardless whether the student is in the Title I room or outside the Title I room, the administration of that Catholic school has not only the duty but the responsibility of assuming control of that child, would you agree with that statement?"

A. When a child receives Title I instruction—before a child receives Title I instruction, Your Honor, a letter goes home to the parents, requesting the parents' permission for the participation of that student in a Title I program. And the parent signs a consent form and sends [118] it back to the Title I teacher. Those are kept on file. So a student does not receive Title I instruction without consent of the parents.

So I think in a degree the parent is relinquishing some responsibility from the private school to the Title I teacher.

Q. I want to ask you a very interesting question that just occurred to me. In the State of Missouri there is a requirement, as I understand it, of six hours of required time under the Compulsory Education Act. Is it your position that the time this student is in the remedial program, that child is not in that private school?

MR. NESLER: Objection, Your Honor. There is nothing in the record to indicate that requirement is applicable to private schools. I don't believe there is any evidence in the record.

THE COURT: There is if their degrees and diplomas are qualified. I can take notice of that.

You are asking if the Title I time is used to qualify private schools?

MR. BOOTHBY: My question really boils down to, when a child is in the Title I program, in your opinion, is he actually in school under the Compulsory School Attendance Law?

MR. NESLER: I think that requires a legal

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[65] neutral. We did perform that function during the audit at the schools we visited.

Q. Was there anything that you were given or was made available to you by anyone in authority that told you what the guidelines, the criteria, any statutory requirement indicating what you were to look for in determining the matter of religious neutrality?

A. No. In fact, the only reference to religious neutrality we could find—we could not find them in the regulations themselves that dealt with Title I or the By-Pass.

The only reference to religious neutrality was in the program agreement between Blue Hills and the Department of Education program representatives. There was a stipulation and provision in the negotiated agreement between the two they would administer the program in a religiously-neutral setting.

We have not been able to find that in the regulations in the Title I statutes. There is a provision that under the By-Pass, that the teachers are not under the supervision of the schools. But there is nothing else we see in the regulations that talk about religious neutrality or tell us what that means.

Q. Okay. So when you performed this part of your responsibilities, tell me what you did.

A. Well, we, Jan Keeney and I, tried to think what do they [66] mean by religious neutrality. And we came to the conclusion evidently what they are meaning is the fact they are not providing the class with various religious articles; they are not saying mass in the same room they are giving Title I. There are not altars, this sort of thing.

And I believe in my deposition to you I couldn't recall the fact that we did do that. But I went back to the workpapers and we had, in fact, and we did find some problems on religious neutrality. They are not in the report. And I can tell you exactly what we found.

We found in the St. Louis LEA in two schools we looked at in St. Louis, for two classrooms we found a crucifix on the wall in one classroom and in another class room—it was held in the library, I believe it was—there was a religious picture on the wall.

In another LEA, I believe Jefferson City, we found a classroom where there was an altar that was covered up with some kind of cover over it, that kept it out. And we felt that was not a problem.

Q. Was or was not?

A. Was not a problem. They had it covered up. It was an altar but they had it covered.

We did present this to Pete Cole during our exit conference, the fact we found articles in rooms, this was a violation of your agreement with the Department [67] of Education. In writing my report, however, I felt that it to be not significant. And I, therefore, made the decision and talked to my Regional Inspector General. And we decided to omit it from the report since we had discussed it with Pete Cole and evidently they were going to make corrections to it.

Q. Let me ask you, I realize that you have a lot of data you have to try to remember and maybe don't know the answer to this. Can you tell me, as best you recall, what

schools you found these various either what you felt was perhaps a violation of the understanding or in the one case it was the covered altar.

A. Two weeks ago I had those two schools memorized. And for the life of me I can't think of them now. I knew you would probably ask me. No, I don't recall.

Q. Incidentally when was this, when did you make that on-site visit at these various schools?

A. I believe that was probably, it was either January of '81 or December of '80, in that time frame.

Q. Did you make any kind of inquiry—by "you" I am talking about either you or your co-worker. Did you make any kind of inquiry as to how long the Title I room had been located at that particular site?

A. No, not to my knowledge, we didn't.

Q. Did you talk to the Title I teacher about finding, for

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[197] assistance in their problem areas, from the teachers and principals in the school?

A. I would imagine that they do. That would probably be the first contact.

Q. Is the Catholic school teacher prohibited from discussing religious topics and religious matters in counseling with those students?

A. I really couldn't answer that. I don't imagine they would be prohibited; certainly not to my knowledge.

Q. Let me go to Our Lady of Americas School, you indicated that you had received word that there was a crucifix in the Title I room at Our Lady of Americas School.

A. That's correct.

Q. And you went over and discussed the matter with the principal first?

A. Yes.

Q. And ultimately also did you have discussion with the parish pastor?

A. I did not have a direct discussion with him. That was handled by way of the principal.

Q. What was the principal's objection to taking down the crucifix?

A. I don't recall that the principal had any objection. I am not real sure who was taking the position that it shouldn't be taken down.

[198]

Q. What position was expressed to you?

A. Well, the principal indicated that the pastor and their local school board, which represented the parents, were somewhat aghast at the thought of taking the crucifix down in one of their classrooms.

I think you would have to understand these are people who did not fully understand the Title I Program and the various restrictions that were provided to make sure that this bypass provision would work.

Q. Were you informed as to why either the principal, or whoever the principal was representing on that particular problem, why they were concerned about a religious symbol being taken down in what has been described throughout this trial as a secular class or secular program?

A. Could you repeat that, please?

Q. Did you receive any information from the principal as to why there was concern about a religious object being taken down from a room which is being used exclusively for a secular class or secular program?

A. No, I just received from the principal some reasons that were not the principal's, on why they didn't have it down.

Q. Do you have any knowledge as to why religious objects are included in areas of a school that is used primarily for the teaching of secular topics?

MR. WILSON: I object to that, Your Honor. I

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[201] than Monsignor Leibrecht, as you understood his testimony?

A. I have found, Mr. Boothby, that the term "authority", I have never really figured out how to measure that as it relates to the church.

My role as superintendent of schools is fairly similar to his, the difference being that they have a lot more schools and a larger staff to provide services. But essentially we both exist for the same purpose. And that is to provide a service in various areas for the operations of the schools.

Q. When there was a problem that developed at Our Lady of Americas School three or four years ago with reference to the crucifix, my understanding is that you went to the Bishop?

A. The Bishop, yes.

Q. When you went to the Bishop, you were instructed to go and take care of it yourself?

A. Yes.

Q. Did he tell you specifically how to take care of it?

A. No, he did not.

Q. Were you acting under his authority when you went and took down the crucifix?

A. I believe I was acting just on my own best judgment at the moment how to resolve the problem.

Q. Did you feel you had the authority to go in the parish school

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